Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for	)	
	)	
Declaratory Ruling Regarding	)	CC Docket No. 99-143
the Use of Section 252(i) to Opt Into	)	
Provisions Containing	)	
Non-Cost-Based Rates	)	

JOINT COMMENTS OF KMC TELECOM INC., LEVEL 3 COMMUNICATIONS, LLC GST TELECOM INC., AND STARPOWER COMMUNICATIONS, LLC

KMC Telecom Inc., Level 3 Communications, LLC, GST Telecom Inc., and Starpower Communications, LLC (collectively "Joint Commenters"), by their counsel, and pursuant to the Commission's May 6, 1999, Public Notice in the above-captioned proceeding, hereby submit these Joint Comments opposing GTE Service Corporation's ("GTE") request for a declaratory ruling in this proceeding ("GTE's Petition").

INTRODUCTION

Section 252(i) of the Communications Act requires ILECs to make the terms and conditions of approved interconnection agreements available to all requesting carriers. The requirements of Section 252(i) are uncomplicated and clearly set forth, and have been carefully considered in numerous proceedings both before the Commission and at the state commission level. GTE has repeatedly refused and continues to refuse to comply with this simple statutory requirement. GTE's argument in this proceeding, that it should be excused from making such

terms available - under Section 51.809 of the Commission's Rules,[1/] is entirely unfounded. Not only does GTE fail to demonstrate or even allege that its cost per service will be higher to requesting carriers, as required by Section 51.809(b), but Section 51.809 specifically requires GTE to raise such issues before the state commissions. Moreover, the relief sought by GTE would permit GTE to discriminate between carriers and undermine the central goal of Section 252(i).

In light of the frivolous and unsupported nature of GTE's claims, Joint Commenters submit that GTE seeks not to draw the Commission's attention to a novel or unresolved issue but rather to further delay the ability of CLECs to obtain reciprocal compensation for ISP traffic. GTE has had a full and fair opportunity to litigate that issue before many state commissions, and after meeting with no success, now seeks to re-litigate that issue before the Commission - or at least delay the implementation of those decisions. The Commission should put a stop to GTE's attempts to abuse the Commission's processes for such ulterior motives.

I. Section 252(i) of the Communications Act Unambiguously and Expressly Requires ILECs to Make All Approved Interconnection Agreements Available to Requesting CLECs

Section 252(i) of the Act expressly provides that local exchange carriers, "shall make available any interconnection, service, or network element provided under an agreement to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." The meaning of this section is plain and clear. Once an ILEC has entered into an interconnection agreement with one telecommunications carrier and the relevant

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[1/] 47 C.F.R. §51.809.

state commission has approved that agreement, GTE must make the terms of that agreement, regardless of what those terms are, available to other requesting carriers.

In enacting Section 252(i), Congress could have imposed any manner of conditions or qualifications on the requirement that ILECs make interconnection agreements available to other carriers. Congress did not. GTE nonetheless requests that the Commission disregard Section 252(i)'s clear language and adopt a new and arbitrary rule that requesting carriers not be permitted to opt into rates contained in interconnection agreements that are not "cost-based." There is no basis to inject such a requirement into Section 252(i).

Indeed, the adoption of the requirement GTE proposes would eviscerate Section 252(i) in its entirety. In particular, all of GTE's arguments are premised on the concept that some of the rates in some of its interconnection are no longer cost based.[2/] Technological changes are constantly changing the costs associated with a particular service. The more rapidly these changes occur the faster GTE agreements will become non-"cost-based." Thus, if the Commission grants GTE's Petition, the Commission will essentially permit GTE to decline to permit a carrier to opt in to any agreement GTE has come to dislike simply by arguing that circumstances, and thus underlying costs, have changed. Such a result is entirely contrary to the plain meaning of Section 252(i).

II. The Concerns Raised by GTE Are Appropriately Addressed Before the State Commissions.

GTE relies, in large part, on Section 51.809 of the Commission's rules for the untenable proposition that ILECs "are not required to make available under Section 252(i) provisions of

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[2/] *GTE Petition* at 1-2.

interconnection agreements which are no longer cost-based."[3/] GTE's reliance on Section 51.809(b) is entirely misplaced. Section 51.809(b) provides that an ILEC need not make available specific terms in two instances. First, if the ILEC demonstrates that it costs the ILEC more to provide service to the requesting carrier than it does to provide service to the original carrier. Second, if the provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible. GTE has neither demonstrated nor even alleged that either of these conditions apply to the services in question. GTE makes no allegations and provides no support for the contention that the cost of service for new requesting carriers will be greater than the cost of service for the carriers now served or that the provision of such service is technically infeasible. Instead GTE relies solely or broad statements that under current interconnection agreements, agreements which GTE voluntarily entered into, GTE is losing money. Such claims, even if proven, are irrelevant.

Moreover, through Section 51.809(b), the Commission has specifically indicated that matters dealing with Section 51.809 should be brought before the appropriate state commission. GTE has simply declined to do so. This is understandable stenantsince GTE knows that it will not likely prevail before those commissions. Numerous state commissions have rejected attempts by incumbent LECs to deny requesting CLECs the terms and conditions contained in approved interconnection agreements. The Maryland and Delaware Public Service Commissions have upheld a CLEC's right to opt-in to voluntarily negotiated rates in an underlying agreement,

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[3/] *GTE Petition* at i.

even though those rates differed from the rates subsequently allowed to go into effect by those Commissions.[4/]

The Illinois Commission affirmed that, contrary to the incumbent LEC's "claim, the Federal Act does not preclude carriers from adopting the reciprocal compensation provisions of an agreement that has already been approved by this Commission. Reciprocal compensation provisions are 'terms and conditions' of interconnection and are therefore part of the agreement that can be adopted under Section 252(i)."[5/] Similarly, the New Hampshire Commission recently held that "[w]e agree . . . that § 252(i) unconditionally permits a Competitive Local Exchange Carrier (CLEC) to adopt an approved interconnection agreement without modification . . . . Refusal to allow other CLECs to adopt an existing interconnection agreement in its entirety is a violation of section 252(i) of the Act."[6/]

Rather than pursue its grievances before the appropriate state commissions, the avenue specifically provided by the Commission, and realizing that the state commissions would be

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[4/] *Starpower Communications, LLC's Petition for Commission Determination of Rates*, Order, ML Nos. 62554, 62269, 62639, and 62703 (MD. P.S.C. Sep. 14, 1998) ("Maryland Decision"); *Joint Application of Bell Atlantic-Delaware, Inc. and Focal Communications Corporation of Pennsylvania for Approval of an Interconnection Agreement Pursuant to Section 252(e) of the Telecommunications Act of 1996*, PSC Docket No. 98-275; *Complaint Filed by Focal Communications Corporation of Pennsylvania for Relief Against Bell Atlantic - Delaware, Inc. for Violating Section 252(i) of the Telecommunications Act of 1996*, Order No. 4959 (DE. P.S.C. Dec. 1, 1999) ("Delaware Decision").

[5/] *QST Communications, Inc. v. Ameritech Illinois, Complaint Pursuant to Sections 10-108 and 13-514 of the Public Utilities Act for Ameritech's Refusal to Execute an Interconnection Agreement with QST Upon the Same Terms and Conditions as Between Ameritech and MCImetro Access Transmission Services, Inc.*, 1998 Lexis 986 (Ill. P.U.C. Nov. 5, 1998).

[6/] *Sprint Communications Company LP*, Order Supporting Petition, DE 98-211, Order No. 23,111 (N.H. P.U.C. Jan. 25, 1999).

unlikely to rule in its favor, GTE has instead sought to do an "end run" around those commissions. Joint Commenters respectfully submit that the Commission's decision to leave the complex and highly fact specific issues presented by Section 51.809(i) to the localized expertise of the various state commissions was well and carefully considered and should not be disturbed here. Morcover, GTE has already litigated and lost the issues in question in this proceeding before numerous state commissions, and the Commission should not, therefore revisit those issues here.

III. GTE's Petition, If Granted, Would Permit GTE to Improperly Discriminate Between Similarly Situated Carriers.

Section 202(a) of the Communications Act prohibits any common carrier from making any "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services." This prohibition prevents carriers from improperly favoring one carrier over another and is integral to the statutory scheme constructed by Congress. As the Commission recognized in its *Local Competition Order*, Section 252(i) is one of the primary tools for preventing discrimination under the 1996 Act.[7/] Unfettered access to the arrangements previously made available by an ILEC is critical to maintaining a level playing field for carriers in the telecommunications market.

All of the interconnection agreements currently at issue remain in force and GTE is currently providing service under the rates, terms and conditions contained in those agreements.

7/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶1296 (1996) (*"Local Competition Order"*), *rev'd in part and aff'd in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1996), *rev'd in part, aff'd in part, and remanded sub nom., AT&T Corp. v. Iowa Utilities Board*, 19 S. Ct. 721 (1999).

GTE cannot unilaterally invalidate those agreements with respect to subsequent carriers. To the extent that other carriers cannot obtain access to services on terms similar to those currently being provided by GTE under existing agreements, those carriers will be competitively disadvantaged.

By preventing carriers from opting into existing agreements, GTE's proposal creates an artificial imbalance in the market and constructs a new barrier to entry by providing a competitive advantage to one carrier over another. One of the most basic tenents supporting the 1996 Act is that the public interest will benefit from competition in the telecommunications market. If new entrants are not able to obtain terms of interconnection on the same rates, terms and conditions of service as those already made available to their competitors, new entrants will likely not be able to match the terms offered by existing carriers or compete effectively against those carriers.

IV. GTE's Petition, If Granted, Will Substantially Reduce the Number of Interconnection Agreements Available to New Entrants.

No statutory basis exists for GTE's argument that requesting carriers should not be permitted to opt in to so-called non-cost based interconnection agreements. Indeed, Section 252(a) of the Act specifically provides that carriers may enter into any agreement with any terms they choose. To effectuate this intent, the Commission, in its *Local Competition Order*, required ILECs to make available services and network elements individually in order to prevent ILECs from inserting into their agreements onerous terms unimportant to the negotiating carrier but

designed to make those agreements unpalatable to other new entrants.[8] GTE now seeks to preclude requesting carriers from obtaining certain terms altogether.

Telecommunications technology continues to evolve, and as GTE itself argues, changing technology continuously affects network architecture and carriers operations.[9] As a result, the costs associated with the provision of service are subject to constant change as new technologies are introduced. This, in turn, implies that interconnection rates can quickly change. Taken to its logical conclusion, GTE's arguments would essentially permit GTE to refuse to permit any carriers to opt into other agreements.

GTE's Petition is a blatant attempt to restrict the ability of new entrants to gain rapid access to GTE's network and to delay entry into the local exchange market. Grant of the relief requested would allow GTE effectively to take many existing interconnection agreements "off the table," thereby forcing many new entrants to expend resources renegotiating agreements from scratch. Such a result would also substantially delay the ability of new entrants to execute their business plans and could deter some CLECs from entering the market altogether.

V. GTE's Petition is Frivolous, Should Be Dismissed and Warrants Sanctions.

Section 1.52 of the Commission's rules,[10] prohibits the submission of documents "interposed for delay," or which are otherwise filed to abuse the Commission's processes for an ulterior motive. Section 1.52 explicitly sets forth the Commission's long standing policy discouraging actions designed or intended to manipulate or take improper advantage of

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[8] *Local Competition Order* at § 1312.

[9] *GTE Petition* at 8.

[10] 47 C.F.R. § 1.52.

Commission process in order to achieve a result which that process was not designed or intended to achieve.[11/] Indeed, the Commission has regularly indicated that it will take tough measures against the filing of such pleadings.[12/]

Rather than raising bona fide issues for Commission consideration, GTE's Petition constitutes only a transparent attempt to circumvent numerous state decisions requiring payment of reciprocal compensation for ISP traffic, thereby discriminating against subsequent carriers who wish to opt-in to underlying agreements that served as the basis for those decisions. Each of the thirty-one (31) state commissions that have considered the issue have decided that reciprocal compensation should be paid for ISP traffic. On February 26, 1999, this Commission released an order concluding that ISP traffic is "jurisdictionally mixed and appears to be largely interstate."[13/] In making this determination, however, the Commission determined that there had been no federal rule on whether reciprocal compensation should be paid for such traffic. The Commission left in place the unanimous state commission decisions interpreting interconnection agreements as requiring compensation for ISP traffic. Since that time, several state commissions have rejected attempts by incumbent LECs to reconsider their previous decisions.[14/]

[11/] *See Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission*, 2 FCC Rcd 5563, 5564 (1987).

[12/] *Commission Taking Tough Measures Against Frivolous Pleadings*, 11 FCC Rcd 3030 (1996).

[13/] *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. Feb. 26, 1999) ("ISP Traffic Decision").

[14/] *See e.g., Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation,* Order Instituting Proceeding to Reexamine Reciprocal Compensation, Case 99-C-0529 (N.Y.P.S.C. Apr. 15, 1999).

Thus, GTE's Petition presents no real issues of controversy for Commission consideration. Rather it constitutes nothing more than a blatant attempt to obstruct and delay the implementation of orders requiring GTE to pay reciprocal compensation to CLECs for ISP traffic. All of the issues presented by GTE in its Petition have been thoroughly resolved and should not be reconsidered here.

CONCLUSION

For the foregoing reasons, Joint Commenters urge the Commission to deny GTE's Petition for a Declaratory Ruling in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 1999, copies of Joint Comments of KMC Telecom Inc., Level 3 Communications, LLC, GST Telecom Inc., and Starpower Communications, LLC were served by first class mail or hand delivery on the following:

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